(2)

No. 04-432

IN THE

# Supreme Court of the United States

PHYSICIANS MULTISPECIALTY GROUP,

*Petitioner*,

*v.*

THE HEALTH CARE PLAN OF HORTON HOMES, INC. and HORTON HOMES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION

R. CARL CANNON
CONSTANGY, BROOKS & SMITH, LLC
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303-1557
(404) 525-8622

*Counsel for Respondents*

190521

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

Should the Court grant certiorari to review the Eleventh Circuit's determination that the Employee Retirement Income Security Act of 1974 does not permit a healthcare provider-assignee to sue to recover benefits under an employee welfare benefit plan whose express terms prohibit the assignment of benefits?

## CORPORATE DISCLOSURE STATEMENT

Respondent The Health Care Plan of Horton Homes, Inc. (the "Plan") is an unincorporated employee welfare benefit plan sponsored, funded and administered by Respondent Horton Homes, Inc. ("Horton Homes"). Horton Homes is a wholly-owned subsidiary of Horton Industries, Inc. No publicly held company owns 10% or more of the stock of either Horton Homes or Horton Industries, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| CORPORATE DISCLOSURE STATEMENT | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF CITED AUTHORITIES | v |
| INTRODUCTION | 1 |
| COUNTERSTATEMENT OF THE CASE | 3 |
| A. ERISA Permits Only a Participant or Beneficiary to Sue for Benefits. | 3 |
| B. Healthcare Providers May Obtain a Derivative Right to Sue Under ERISA. | 3 |
| C. The Plan Contains a Clear and Unambiguous Anti-Assignment Provision. | 4 |
| D. The Holding of the Eleventh Circuit Follows the Decisions of the Other Circuit Courts of Appeals That Have Addressed the Issue. | 5 |
| E. Statement of the Proceedings Below. | 8 |
| F. Counterstatement of Facts. | 9 |

*Contents*


| | Page |
|---|---|
| REASONS FOR DENYING THE PETITION .... | 11 |
| A. The Law Regarding Who Can Sue to Recover Benefits from an ERISA-Governed Employee Welfare Benefit Plan Is Well-Established and Consistent Among the Circuits. ..... | 11 |
| B. The Courts of Appeals Have Consistently Held That the Assignment of Benefits Under ERISA-Governed Welfare Benefit Plans Is a Matter of Contract Subject to Negotiation Between the Parties. ..... | 13 |
| C. Relying on Fundamental Principles of Contract Interpretation, the Eleventh Circuit Properly Enforced the Plan's Anti-Assignment Provision and Deemed PMG's Purported Assignment Void. ..... | 15 |
| CONCLUSION ..... | 18 |

## TABLE OF CITED AUTHORITIES

**Cases** *Page*

*Allessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) ..... 13

*Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997) .... 3, 4, 6

*City of Hope Nat'l. Med. Ctr. v. Healthplus, Inc.*, 156 F.3d 223 (1st Cir. 1998) ..... 5, 6, 7

*Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272 (6th Cir. 1991) ..... 4

*Dallas County Hospital District v. Associates Health and Welfare Plan*, 293 F.3d 282 (5th Cir. 2002) ..... 6, 15, 16, 17

*Davidowitz v. Delta Dental Plan, Inc.*, 946 F.2d 1476 (9th Cir. 1991) ..... 5, 7

*Hermann Hospital v. MEBA Med. and Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988) ("*Hermann I*") ..... *passim*

*Hermann Hospital v. MEBA Medical & Benefits Plan*, 959 F.2d 569 (5th Cir. 1992) ("*Hermann II*") ..... *passim*

*I.V. Services of America, Inc. v. Trustees of the American Consulting Engineers Council Insurance Trust Fund*, 136 F.3d 114 (2d Cir. 1998) ..... 6

*Cited Authorities*

*Page*

*Kennedy v. Connecticut Gen. Life Ins. Co.*, 924 F.2d 698 (7th Cir. 1991) ..... *passim*

*LeTourneau Lifelike Orthotics & Prosthetics, Inc. v. Wal-Mart Stores, Inc.*, 298 F.3d 348 (5th Cir. 2002) ..... 5, 6, 7

*Lutheran Med. Ctr. of Omaha, Nebraska v. Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan*, 25 F.3d 616 (8th Cir. 1994) ..... 5, 6

*Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) ..... 6, 13, 14

*Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986) ..... 4, 6

*Northeast Dept. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) ..... 14

*Physicians Multispecialty Group v. The Health Care Plan of Horton Homes, Inc.*, 371 F.3d 1291 (11th Cir. 2004) ..... 9, 13, 14, 15

*Rice v. Railroad Co.*, 66 U.S. (1 Black) 358 (1861) .. 3

*Richstone v. Chubb Colonial Life Ins.*, No. 97 CIV. 3481 HB HBP, 1999 WL 287332, at *4-5 (S.D.N.Y. May 7, 1999) ..... 5

*Cited Authorities*


| | Page |
|---|---|
| *St. Francis Reg'l. Med. Ctr. v. Blue Cross/Blue Shield of Kan.*, 49 F.3d 1460 (10th Cir. 1995) | 5, 6 |
| *Washington Hospital Center Corp. v. Hospitalization Group and Medical Services, Inc.*, 758 F. Supp. 750 (D.D.C. 1991) | 5 |
| **Statutes** | |
| Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* | 1 |
| ERISA Section 3(1), 29 U.S.C. § 1002(1) | 9 |
| ERISA Section 3(7), 29 U.S.C. § 1002(7) | 11 |
| ERISA Section 3(8), 29 U.S.C. § 1002(8) | 11 |
| ERISA Section 206(d), 29 U.S.C. § 1056(d) | 3 |
| ERISA Section 502(a), 29 U.S.C. § 1132(a) | 11 |
| ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132 (a)(1)(B) | 3, 8, 11 |
| **Other Authority** | |
| Restatement (Second) of Contracts § 322 comment a (1981) | 7 |

To the honorable Justices of the Supreme Court of the United States:

Respondents, The Health Care Plan of Horton Homes, Inc. (the "Plan") and Horton Homes, Inc. ("Horton Homes"), for the reasons set forth below, respectfully request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

## INTRODUCTION

Respondents oppose the petition of Physicians Multispecialty Group ("PMG") for a writ of certiorari to review a decision of the Eleventh Circuit because that decision merely adopts and applies existing law. In this case, the Eleventh Circuit adopted the widely-accepted view that the Employee Retirement Income Security Act of 1974 ("ERISA") does not prohibit restrictions on the assignment of benefits under employee welfare benefit plans, but leaves the negotiation of assignability or non-assignability provisions in such plans to the contracting parties. Having adopted the consensus view, the court simply enforced the clear and unambiguous Plan provision prohibiting the assignment of benefits. The Court should deny PMG's petition because the Eleventh Circuit's decision in this case is consistent with the decision of each federal court that has addressed the issue and presents no issue compelling review by the Court.

Having adopted the consensus view, the Eleventh Circuit, in a unanimous panel decision, held that an express and unambiguous Plan provision barring the assignment of benefits by a participant or beneficiary is a "valid and

enforceable provision," that such a contractual provision prohibiting the assignment of benefits is consistent with Congressional intent regarding ERISA-governed employee welfare benefit plans, and that the Plan provision operates to void any purported assignment held by PMG. Consequently, PMG, being neither a plan participant nor a beneficiary, has no independent cause of action against Respondents, and because the purported assignment is void under the express terms of the Plan, PMG cannot maintain a derivative action, either. The Eleventh Circuit thus properly reversed the district court's grant of summary judgment in favor of PMG, holding that PMG cannot maintain an action for benefits against Respondents under ERISA. The Eleventh Circuit subsequently denied PMG's request for rehearing or rehearing *en banc*.

The facts in this case are undisputed and present no compelling basis for review by the Court. The Eleventh Circuit's decision in this case does not involve any "important question of federal law" in a way that "conflicts with relevant decisions of this Court" or of the courts of appeals. The issues of law presented are neither novel nor complex, and the decision of the Eleventh Circuit is entirely consistent with the reasoning and analysis developed in similar cases decided by other courts of appeals. Therefore, the petition should be denied.

## COUNTERSTATEMENT OF THE CASE

### A. ERISA Permits Only a Participant or Beneficiary to Sue for Benefits.

Section 502 of ERISA only authorizes participants and beneficiaries to sue for benefits.[1] It is well-established that healthcare providers are not generally within the ERISA definition of either "beneficiary" or "participant" for purposes of bringing suit against an employee benefit plan and, therefore, do not have independent standing to sue for benefits.[2]

### B. Healthcare Providers May Obtain a Derivative Right to Sue Under ERISA.

Except in Section 206(d) (which expressly prohibits the assignment of benefits under pension plans governed by ERISA),[3] ERISA is silent as to the permissibility of an assignment of benefits under an employee benefit plan. Federal courts considering the issue have uniformly held that healthcare providers may, where a welfare benefit plan permits assignment, obtain a derivative right to sue by

---

1. 29 U.S.C. § 1132(a)(1)(B).

2. *See, e.g., Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir. 1997); *Hermann Hosp. v. MEBA Med. and Benefits Plan*, 845 F.2d 1286, 1289 (5th Cir. 1988) ("*Hermann I*"); *cf. Rice v. Railroad Co.*, 66 U.S. (1 Black) 358, 374 (1861) (holding that since only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary, the courts may not infer a grant of jurisdiction absent a clear legislative mandate).

3. 29 U.S.C. § 1056(d).

obtaining a valid written assignment of the right to payment of benefits from a "beneficiary" or "participant."[4]

**C. The Plan Contains a Clear and Unambiguous Anti-Assignment Provision.**

The Plan expressly and unambiguously prohibits the assignment of benefits as follows:

> **ASSIGNABILITY**
>
> Amounts payable at any time may be used to make direct payments to health care providers. Except as applicable law may otherwise require, **no amount payable at any time hereunder shall be subject in any manner to alienation by** anticipation, sale, transfer, **assignment**, bankruptcy, pledge, attachment, charge or encumbrance of any kinds. **Any attempt to** alienate, sell, transfer, **assign,** pledge, attach, charge or otherwise encumber **any such amount, whether presently or hereafter payable, shall be void.** The Plan shall not be liable for or subject to the debts or liabilities of any person entitled to any amount payable under the Plan, or any part thereof.

Plan, at Appendix to Petition, p. 89a (emphasis added).

---

4. *See, e.g., Cagle*, 112 F.3d at 1515; *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1277 (6th Cir. 1991); *Kennedy v. Connecticut General Life Ins.*, 924 F.2d 698, 700 (7th Cir. 1991); *Hermann I*, 845 F.2d at 1289; *Misic v. Bldg. Serv. Employees Health and Welfare Trust*, 789 F.2d 1374, 1379 (9th Cir. 1986).

It is undisputed that, after oral argument on cross-motions for summary judgment before the district court, PMG obtained an assignment from the mother of Candace Murray purporting to grant a right to recover benefits from the Plan. It is further undisputed that Ms. Murray was a patient to whom PMG rendered services prior to her death, and that the Plan denied benefits for Ms. Murray on the ground that she was not an eligible dependent child, within the meaning of the Plan.[5]

## D. The Holding of the Eleventh Circuit Follows the Decisions of the Other Circuit Courts of Appeals That Have Addressed the Issue.

The Eleventh Circuit carefully reviewed the statute and the specific terms of the Plan before it and followed reasoning adopted by at least six other circuits,[6] as well as a number of district courts in other circuits.[7] The courts of appeals that

---

5. The denial of benefits by the Plan is not at issue in PMG's petition.

6. *See, e.g., LeTourneau Lifelike Orthotics & Prosthetics, Inc. v. Wal-Mart Stores, Inc.*, 298 F.3d 348 (5th Cir. 2002); *City of Hope Nat'l. Med. Ctr. v. Healthplus, Inc.*, 156 F.3d 223, 229 (1st Cir. 1998); *St. Francis Reg'l. Med. Ctr. v. Blue Cross/Blue Shield of Kan.*, 49 F.3d 1460, 1464-65 (10th Cir. 1995); *Lutheran Med. Ctr. of Omaha, Nebraska v. Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan*, 25 F.3d 616, 619 (8th Cir. 1994); *Kennedy v. Connecticut Gen. Life Ins. Co.* 924 F.2d 698 (7th Cir. 1991); *Davidowitz v. Delta Dental Plan, Inc.*, 946 F.2d 1476, 1480-81 (9th Cir. 1991).

7. *See, e.g., Richstone v. Chubb Colonial Life Ins.*, No. 97 CIV. 3481 HB HBP, 1999 WL 287332, at *4-5 (S.D.N.Y. May 7, 1999); *Washington Hospital Center Corp. v. Hospitalization Group and Medical Services, Inc.*, 758 F. Supp. 750, 755 (D.D.C. 1991).

have considered the matter have unanimously concluded that (1) healthcare providers have no independent cause of action under ERISA;[8] (2) ERISA's silence on the issue of assignability or non-assignability of benefits under employee welfare benefit plans leaves the issue to the agreement of the contracting parties;[9] (3) to the extent that a valid assignment exists, a healthcare provider has a derivative cause of action under ERISA to recover benefits;[10] and (4) the validity of a non-assignment provision in a particular plan, and/or the validity of a particular assignment to a healthcare provider under a plan that contains no anti-assignment provision, is a matter of contractual

---

8. *Letourneau*, 298 F.3d at 351; *Dallas County Hospital District v. Associates Health and Welfare Plan*, 293 F.3d 282, 285 (5th Cir. 2002); *City of Hope*, 156 F.3d at 226; *Cagle*, 112 F.3d at 1514; *Hermann Hospital v. MEBA Medical & Benefits Plan*, 959 F.2d 569, 572, 576 (5th Cir. 1992) ("*Hermann II*"); *Hermann I*, 845 F.2d at 1289.

9. *City of Hope*, 156 F.3d at 229; *St. Francis*, 49 F.3d at 1465; *Davidowitz*, 946 F.2d at 1480-81; *see also Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988) ("[Congress] had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans, and *not* ERISA welfare benefit plans. In a comprehensive regulatory scheme like ERISA, such omissions are significant ones.").

10. *Letourneau*, 298 F.3d at 351; *City of Hope*, 156 F.3d at 227; *I.V. Services of America, Inc. v. Trustees of the American Consulting Engineers Council Insurance Trust Fund*, 136 F.3d 114, 117 n.2 (2d Cir. 1998); *Cagle*, 112 F.3d at 1515; *Lutheran Med. Ctr.*, 25 F.3d at 619; *Hermann II*, 959 F.2d at 576; *Kennedy*, 924 F.2d at 700; *Hermann I*, 845 F.2d at 1290; *Misic*, 789 F.2d at 1378-79.

interpretation.[11] Consistent with the reasoning of the other circuits, the Eleventh Circuit concluded that "an assignment is ineffectual if the plan contains an unambiguous anti-assignment provision." Considering the Plan's clear and unambiguous anti-assignment provision, the Eleventh Circuit further concluded that the clause is enforceable, the purported assignment of benefits to PMG is void, and PMG lacks derivative standing to challenge the Plan's denial of benefits.

PMG artificially parses the sole issue decided by the Eleventh Circuit (i.e., whether PMG is authorized to bring suit under ERISA to recover benefits) into three sub-issues in a vain attempt to establish a split of authority among the various courts of appeals where none exists.

The decision of the Eleventh Circuit consistently applies the analysis adopted by at least six other courts of appeals that have addressed the issue. Contrary to PMG's assertion, there is no conflict among the circuits on the issue presented, and the petition should be denied.[12]

---

11. *Letourneau*, 298 F.3d at 351-52; *City of Hope*, 156 F.3d at 227; *Hermann II*, 959 F.2d at 574-75; *Kennedy*, 924 F.2d at 700; *Davidowitz*, 946 F.2d at 1480-81; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 322 comment a (1981) (as a general rule of law, where the parties' intent is clear, courts will enforce non-assignment provisions).

12. PMG erroneously relies upon *Hermann I* for support of its contention that there is a split among the circuits on this issue. In fact, the Fifth Circuit's decision in *Hermann I* is entirely consistent with the decision of the Eleventh Circuit in this case. In *Hermann I*, the Fifth Circuit held that (1) the hospital was not among those included in the list of parties to whom Congress granted a right of

(Cont'd)

## E. Statement of the Proceedings Below.

PMG filed its complaint on July 15, 2002, and subsequently filed an amended three-count complaint on October 9, 2002. Only Count I of the amended complaint, a claim for benefits against the Plan under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), is the subject of PMG's petition.[13] In their answer to PMG's complaint, Respondents asserted, among others, the defense that PMG lacked standing to bring its claim under ERISA.

The district court heard oral argument on the parties' respective motions for summary judgment on July 9, 2003. On August 4, 2003, the district court entered an order granting

(Cont'd)
action under Section 502, and thus had no independent standing to sue to recover benefits under ERISA, 845 F.2d at 1287, (2) ERISA permits the assignment of health care benefits so that derivative standing to sue for benefits can arise pursuant to a valid assignment to the healthcare provider, *Id.* at 1289, and (3) the record before the court did not enable the court to determine whether the hospital was an assignee who could assert derivative standing, particularly because the plan maintained that the purported assignment held by the hospital was invalid. *Id.* at 1290. Thereafter, in *Hermann II*, the Fifth Circuit held, in pertinent part, that the assignment of benefits to the hospital was valid, 959 F.2d 573, 579, and based on its actions, the plan was estopped from relying on an anti-assignment clause in the plan. *Id.* at 574, 579. Thus, the decisions of the Fifth Circuit in *Hermann I* and *II* are entirely consistent with that of the Eleventh Circuit in this case and the other courts of appeals that have addressed the issue.

13. Counts II and III of the amended complaint, which alleged state law claims against Respondent Horton Homes, were dismissed with prejudice by consent of all parties on December 3, 2002.

summary judgment in favor of PMG and denying the motions for summary judgment of the Plan and Horton Homes. Judgment was entered in accordance with the district court's order on the same date.

The Plan and Horton Homes filed a timely notice of appeal on August 15, 2003. On June 3, 2004, the United States Court of Appeals for the Eleventh Circuit issued a unanimous opinion reversing the district court's grant of summary judgment to PMG on the ground that "the anti-assignment clause in the Plan precludes PMG from maintaining an ERISA action based on its reliance upon an assignment of benefits."[14]

PMG, on June 15, 2004, moved for rehearing, or alternatively for rehearing *en banc*. On July 23, 2004, the United States Court of Appeals for the Eleventh Circuit issued its order denying PMG's petition for rehearing and petition for rehearing *en banc*.

**F. Counterstatement of Facts.**

The Plan is an "employee welfare benefit plan" within the meaning of Section 3(1) of ERISA.[15] Horton Homes is the Sponsor and Administrator of the Plan.

PMG is a physician group that provided medical treatment to Candace Murray, a minor, prior to her death. Ms. Murray was the daughter of Mr. Linton Franklin, an employee of Horton Homes, and a participant in the Plan.

---

14. 371 F.3d 1291, 1292 (11th Cir. 2004).

15. 29 U.S.C. § 1002(1).

The third party administrator ("TPA") of the Plan denied PMG's claim for treating Ms. Murray. This determination was based on the TPA's conclusion that Ms. Murray was not an eligible dependent child of Mr. Franklin "because she was not principally dependent upon Mr. Franklin for financial support." The TPA relied upon the Plan's definition of "Dependent Child," and the information provided on an "Eligibility Information" questionnaire completed by Mr. Franklin and dated October 18, 2001. Mr. Franklin indicated in his response to the questionnaire that Ms. Murray did not reside with him at any time before or during his participation in the Plan, that he paid $90 per month in child support to the Child Support Office in Thomson, Georgia, that he provided additional money and clothing when Ms. Murray called and said she needed something (no indication of the dollar amount of this additional assistance was provided), and that he did not claim Ms. Murray as a dependent for income tax purposes.

The Plan Administrator, on timely appeal by PMG, affirmed the TPA's denial of PMG's claim, based on the information previously provided by Mr. Franklin, and its own further investigation. Specifically, the Plan Administrator, based on undisputed factual determinations, concluded that Ms. Murray was not within the Plan's definition of "Dependent Child" because Ms. Murray had two other sources of financial support that were greater than the $90 per month contributed by Mr. Franklin: Ms. Murray herself earned an average of $223 per month, and her mother received $280 per month in public assistance based in part on her need to provide support for Ms. Murray.

On July 18, 2003, after oral argument before the district court on the parties' respective motions for summary

judgment, PMG obtained an assignment of the right to recover benefits under the Plan from Ms. Pamela Murray, the mother, custodial parent and ostensible executor of Candace Murray's estate.

## REASONS FOR DENYING THE PETITION

### A. The Law Regarding Who Can Sue to Recover Benefits from an ERISA-Governed Employee Welfare Benefit Plan Is Well-Established and Consistent Among the Circuits.

There is no dispute among the courts of appeals regarding who can sue to recover benefits from an employee benefit plan under Section 502.[16] Congress explicitly limited the universe of private persons who can bring a civil action to recover benefits under a plan to "a participant or beneficiary."[17] For purposes of this case, the "participant" is Mr. Linton Franklin because he is "an employee . . . of an employer . . . who is or may become eligible to receive a benefit"[18] under the Plan. The "beneficiary" in this case would have been Ms. Candace Murray because, had she been eligible, she would have been "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become **entitled** to a benefit thereunder."[19]

---

16. 29 U.S.C. § 1132(a)(1)(B).

17. 29 U.S.C. § 1132(a).

18. 29 U.S.C. § 1002(7).

19. 29 U.S.C. § 1002(8) (emphasis added).

PMG points to the Seventh Circuit's decision in *Kennedy v. Connecticut General Life Ins. Co.*[20] as supporting its assertion that the courts of appeals are in conflict regarding whether a healthcare provider can sue in its own right as a "beneficiary" under Section 502. In that case, however, Kennedy was a healthcare provider suing as an assignee of the plan participant's spouse, the beneficiary.[21] *Kennedy*, therefore, does not stand for the proposition that the healthcare provider is a "beneficiary" within the ERISA definition of that term. Rather, *Kennedy* recognizes that an assignee of ERISA-covered medical benefits has a derivative right to bring an action under Section 502(a) if the plan does not contain a provision barring the assignment of benefits. *Kennedy* is factually distinguishable from this case because the plan at issue contained no anti-assignment provision, and the validity of the assignment held by Kennedy was not challenged.

For its part, PMG argues that it is a "beneficiary" within the ERISA definition by virtue of the Plan's definition of "beneficiary," and is, therefore, authorized to sue to recover benefits from the Plan under Section 502.[22] PMG's analysis is flawed and was implicitly rejected by the Eleventh

---

20. 924 F.2d 698 (7th Cir. 1991).

21. *Id.* at 699.

22. PMG has a particular interest in establishing its right to sue as a "beneficiary" under ERISA because the purported assignment upon which PMG relies to support its claim that it has a derivative right of action as an assignee-provider was not executed until July 18, 2003, more than a year after PMG instituted this lawsuit. (Appendix to Petition, at 87a).

Circuit.[23] Neither the Plan's definition of "beneficiary," nor any other provision of the Plan, **entitles** PMG (or any healthcare provider) to a benefit under the Plan. Rather, the Plan merely **permits** the administrator to exercise its discretion to make payments directly to healthcare providers.

The Seventh Circuit's decision in *Kennedy* is consistent with that of the Eleventh Circuit in this case, as well as with the decisions of the other courts of appeals that have considered this issue. There is no split of authority among the circuits and no basis for granting the writ of certiorari on this issue.

### B. The Courts of Appeals Have Consistently Held That the Assignment of Benefits Under ERISA-Governed Welfare Benefit Plans Is a Matter of Contract Subject to Negotiation Between the Parties.

In *Mackey v. Lanier Collection Agency & Service, Inc.*,[24] the Court held that Congress did not intend to prohibit the assignment or alienation of benefits with respect to ERISA welfare plan benefits, but by its silence, "'acknowledged and accepted the practice, rather than prohibiting it.'"[25] Building on that holding, the courts of appeals have uniformly held that "ERISA leaves the assignability or non-assignability of

---

23. "Healthcare providers, such as PMG, are generally not 'participants' or 'beneficiaries' under ERISA and thus lack independent standing to sue under ERISA." 371 F.3d at 1294.

24. 486 U.S. 825 (1988).

25. *Id.* at 838, quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516 (1981).

health care benefits under ERISA-regulated welfare plans to the negotiations of the contracting parties."[26]

Furthermore, to the extent that an ERISA-regulated welfare plan contains no provision barring such assignment, the courts of appeals have consistently recognized the derivative right of a healthcare provider to sue as an assignee to recover benefits under Section 502(a).[27]

In an effort to identify a split among the circuits on this issue, PMG relies upon *Northeast Dept. ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*.[28] That decision, however, predates the Court's holding in *Mackey*, and its statement regarding assignment of benefits is mere dicta in that the case involved a dispute concerning priority between two welfare plans[29] and did not involve an assignment of benefits.

PMG has failed to identify any split of authority among the circuits that would warrant review of the Eleventh Circuit's decision in this case, and the petition should be denied.

---

26. 371 F.3d at 1295.

27. *Id.*

28. 764 F.2d 147 (3d Cir. 1985).

29. *Id.* at 149.

### C. Relying on Fundamental Principles of Contract Interpretation, the Eleventh Circuit Properly Enforced the Plan's Anti-Assignment Provision and Deemed PMG's Purported Assignment Void.

Reviewing the Plan's anti-assignment provision, the Eleventh Circuit concluded that it was clear and unambiguous and, therefore, enforceable under general principles of contract law. Consequently, the court wrote that "[b]y its own terms, the provision clearly and unambiguously prohibits Murray from assigning benefits to PMG. Accordingly, the anti-assignment clause precludes PMG's maintenance of an ERISA action."[30]

PMG argues that this holding is in conflict with two decisions of the Fifth Circuit, *Hermann II*,[31] and *Dallas County Hospital District v. Associates Health and Welfare Plan*.[32] Nothing in those cases, however, places the Fifth Circuit in conflict with the Eleventh Circuit. Rather, in each case, the Fifth Circuit merely applied contract principles to determine the validity and enforceability of both anti-assignment provisions and the assignments held by healthcare providers.

In *Hermann II*, the Fifth Circuit acknowledged the viability of anti-assignment provisions in ERISA-regulated welfare plans,[33] but under the specific facts of the case before it applied the equitable doctrine of estoppel against the plan and declined to enforce the anti-assignment provision because the plan

---

30. 371 F.3d at 1296.

31. 959 F.2d 569.

32. 293 F.3d 282 (5th Cir. 2002).

33. 959 F.2d at 574.

failed to assert the clause in a timely manner.[34] Following its decision that the plan was estopped to assert the anti-assignment provision, the court deemed the assignment valid but concluded nonetheless that "neither [the participant's] authorizing the plan to pay the hospital directly, nor [the beneficiary's] assignment of the right to recover payments for benefits provided, elevated Hermann to the status of beneficiary under the plan."[35] The Fifth Circuit concluded that the hospital simply had a derivative right as an assignee to sue under ERISA to recover payment under the plan.

Subsequently, in *Dallas County Hospital*, the Fifth Circuit, reviewing its decision in *Hermann II*, noted that "the question whether anti-assignment clauses in ERISA-governed welfare plans are enforceable remains unresolved in this Circuit."[36] The *Dallas County Hospital* panel affirmed that the hospital had no "independent standing" as a beneficiary to bring suit under Section 502 of ERISA[37] and, after careful analysis of various provisions of the plan, concluded that the hospital was a "network provider" within a specific exception to the anti-assignment provisions of the contract that allowed the assignment of benefits to network providers.[38] The hospital, therefore, enjoyed a derivative right to sue under ERISA for payment of benefits.[39]

---

34. *Id.*

35. *Id.* at 576.

36. 293 F.3d at 287.

37. *Id.* at 289.

38. *Id.* at 288-89.

39. *Id.*

In both *Hermann II*, and *Dallas County Hospital*, the Fifth Circuit applied the same reasoning that other courts of appeals, including the Eleventh Circuit in this case, have consistently adopted. The Fifth Circuit simply applied fundamental principles of contract law to determine in each case whether the plan could enforce an anti-assignment provision and to determine whether the health care provider asserting a right to sue under ERISA could bring a derivative action by virtue of an assignment by a participant or beneficiary.

In this regard, PMG asserts that applying the Fifth Circuit's analysis of the plan language before it to the Plan in this case, the Eleventh Circuit's interpretation of the Plan in this case is wrong. In essence, PMG argues that even if the Eleventh Circuit has properly stated the applicable rule of law, it has erroneously applied the law to the facts before it. PMG's position is incorrect. In this case, the anti-assignment provision is unambiguous, and there is no contractual exception such as the one at issue in *Dallas County Hospital*.

Furthermore, a claimed misapplication of a properly stated rule of law does not present a compelling basis for review by the Court, and PMG's petition should be denied.

## CONCLUSION

For the foregoing reasons, PMG's petition for a writ of certiorari should be denied.

Respectfully submitted,

R. CARL CANNON
CONSTANGY, BROOKS & SMITH, LLC
230 Peachtree Street, N.W.
Suite 2400
Atlanta, Georgia 30303-1557
(404) 525-8622

*Counsel for Respondents*